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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN VALDERRAMA,

Defendant and Appellant.

D073930

(Super. Ct. No. SCD272278)

APPEAL from a judgment of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed.

Kent D. Young, under appointment by the Court of Appeal, on behalf of Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

In his appeal, Christian Valderrama asks us to reverse his conviction for assault with a deadly weapon because the court recited jury instructions that include two

alternatives for establishing a deadly weapon, one of which the prosecution did not rely upon. We decline to do so.

FACTUAL AND PROCEDURAL BACKGROUND

Gabriel M. had been friends with the Valderrama family for over a decade. He began renting a room in the apartment next door in mid-March 2017, but sometimes he stayed overnight in the Valderramas' living room. Valderrama did not live at home. On the afternoon of June 2, 2017, he was at the family home when he approached Gabriel from behind with a baseball bat that the Valderrama family kept in the home.

Valderrama placed the bat around the front of Gabriel's throat, lifted Gabriel off his seat on the table with the bat, and threw Gabriel to the ground. Once Gabriel was on the ground, Valderrama beat him, striking him on the knee, elbow, arms, and face.

Eventually, Valderrama dropped the bat, crossed the street, and left. Valderrama's sister E.V., who was in high school and home during the attack, called 911. Gabriel was dizzy, bleeding, and unable to walk. He spent several hours at the hospital, and as of March 2018, he continued to suffer jaw and throat pain, as well as some hearing loss.

At trial, Valderrama offered an alibi defense, testifying that he had never seen nor met Gabriel, and on the date of the incident, he spent the entire day, into the evening, looking for a job. Then he ate a late meal, walked around, and ended up at a park around midnight, where he stayed until morning.

The parties agreed to jury instruction CALCRIM No. 875.¹ Accordingly, the court instructed the jury: "To prove that the defendant is guilty of [assault with a deadly weapon], the people must prove that . . . the defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of its force to a person." The court defined deadly weapon as "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

The court also instructed the jury that if it were to find Valderrama guilty of assault with a deadly weapon, it should then consider whether the prosecution had proved the additional allegation that he used a deadly or dangerous weapon in the commission of the crime. In the context of this instruction, the court read CALCRIM No. 3145, which states in relevant part: "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury. In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed, where the person who possessed the object was going, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose."

¹ Although Valderrama's attorney agreed to the jury instruction, Valderrama did not forfeit the opportunity to challenge it because a challenge to an instruction regarding an element of a crime may be raised for the first time on appeal. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

In closing argument, the prosecutor explained a dangerous weapon could be an inherently dangerous object like a gun, but it was also "any object that . . . is capable and likely to cause death or great bodily injury." The prosecutor offered a baseball bat as such an object, stating it could be used to play baseball, or, as it was used in the present case, to strangle or bludgeon someone, giving it characteristics of a deadly weapon.

The jury found Valderrama guilty of assault with a deadly weapon. (Pen. Code,² § 245, subd. (a)(1).) It also found true the allegation that Valderrama personally used a dangerous or deadly weapon, the baseball bat, and that he personally inflicted great bodily injury upon Gabriel. (§§ 1192.7, subd. (c)(23), 12022.7, subd. (a).) The court sentenced Valderrama to an aggregate term of six years in prison, three years for assault with a deadly weapon, followed by three years for inflicting great bodily injury. Valderrama timely appealed.

² Further section references are to the Penal Code.

DISCUSSION

Valderrama does not argue that the prosecution failed to prove the baseball bat was used as a deadly weapon. Instead, his position is that the use of alternative options within the jury instructions to establish use of a deadly weapon was reversible error because it provided jurors with two legal theories, one which was valid and one which was not. The People concede the instruction was erroneous but contend the error was harmless. We agree with the People and affirm.

We review an assertion of instructional error de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.) The parties agree a baseball bat is not an inherently deadly weapon; thus, while CALCRIM Nos. 875 and 3154 generally were correct statements of the law (see *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176 (*Velasquez*)), the inclusion of reference to an inherently deadly weapon was error. At issue is whether the error is legal in nature or factual in nature and what prejudice standard applies.

An instruction contains a legal error if it includes an incorrect statement of law; a factual error exists if an otherwise valid legal theory is not supported by the facts or evidence in a case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125.) An object may be either inherently deadly or deadly as used. (*Velasquez, supra*, 211 Cal.App.4th at p. 1176.) Some objects, like dirks and blackjacks, have been found inherently deadly as a matter of law. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) Other objects, like knives and box cutters, have been found not inherently dangerous as a matter of law. (*People v. Kersey* (1957) 154 Cal.App.2d 364, 366 [knives]; *People v. McCoy* (1944)

25 Cal.2d 177, 188 [box cutters] (*McCoy*).) The Supreme Court has described a baseball bat as an object "commonly used for a nonviolent purpose" which could qualify as dangerous when the surrounding circumstances indicate the possessor is using it for a dangerous purpose. (*People v. King* (2006) 38 Cal.4th 617, 624 (*King*), discussing *People v. Grubb* (1965) 63 Cal.2d 614, 620-621, superseded by statute on other grounds.)

Because a baseball bat's ordinary use is not deadly or dangerous (*King, supra*, 38 Cal.4th 617), it cannot be an inherently deadly weapon. (See *People v. Perez* (2018) 4 Cal.5th 1055, 1065.) Thus, the inclusion of both alternatives was legal, not factual, error. (See, e.g., *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318 (*Stutelberg*); *People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1154, review granted July 5, 2018, S248105 (*Aledamat*).)³

Even though the portion of the jury instruction referencing inherently deadly objects was erroneous, the error was not prejudicial. Valderrama asks us to adopt the standard for harmlessness employed in *Aledamat*, which requires reversal when "there is no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently dangerous weapon was actually used)." (*Aledamat, supra*, 20 Cal.App.5th at p. 1154.) We decline to do so.

The Supreme Court recently held that an error in instructions on the elements of a crime is harmless "so long as the error does not vitiate *all* of the jury's findings," meaning

³ The Supreme Court granted review in *Aledamat* to address the standard for evaluating prejudice resulting from a legal error. While we agree with *Aledamat* that this type of error is legal in nature, we disagree on the appropriate standard for prejudice, and we cite *Aledamat* solely for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

it would be harmless error if it were "clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 829, 831.) It also held that offering an instruction on an invalid legal theory may be harmless when " 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary' " to convict the defendant under the alternative, valid legal theory. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226, quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1205.) Thus, "we apply the *Chapman* [citation] standard to evaluate an instruction that improperly defines an element of a charged offense." (*Stutelberg, supra*, 29 Cal.App.5th at p. 319; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (2012) 210 Cal.App.4th 1, 12-13.) Under *Chapman*, an instructional error must result in reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*Stutelberg*, at p. 319.)

Here the prosecutor only presented the theory that the bat was a deadly weapon due to its manner of use.⁴ The prosecutor presented evidence showing the family possessed the bat because Valderrama's younger brother D.V. used it to play baseball, and Valderrama used the weapon to strangle and then beat Gabriel with it. Additionally, throughout her closing argument, the prosecutor repeated that the bat was a deadly weapon because of how Valderrama used it—to strangle Gabriel and as a blunting or bludgeoning instrument.

⁴ In contrast, in *Aledamat*, the prosecutor argued the weapon, a box cutter, was both inherently dangerous, contrary to case law (see *McCoy, supra*, 25 Cal.2d at p. 188), and deadly because it was used in a way capable of and likely to cause great bodily injury. (*Aledamat, supra*, 20 Cal.App.5th at p. 1152.)

Using a baseball bat to beat someone undoubtedly qualifies as using an item "in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM Nos. 875 & CALCRIM 3145.) Neither the evidence nor the prosecutor's argument invited the jury to reach a guilty verdict on the theory of the bat being inherently dangerous. Had the jury been presented only with the "deadly or dangerous as used" theory and not the inapplicable inherently deadly weapon alternative, it is clear beyond a reasonable doubt that the jury would have reached the same verdict.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

GUERRERO, J.